

THE HONORABLE RICARDO S. MARTINEZ

THE HONORABLE THERESA L. FRICKE

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UTHERVERSE GAMING LLC,

Plaintiff,

v.

EPIC GAMES, INC.,

Defendant.

Case No. 2:21-cv-00799-RSM-TLF

**JOINT STATUS REPORT AND  
DISCOVERY PLAN**

Date: March 8, 2023

1 Per the Court's minute order of February 23, 2023 (Dkt. No. 183), Plaintiff Uthervse  
2 Gaming, LLC ("Plaintiff" or "Uthervse") and Defendant Epic Games, Inc. ("Defendant" or  
3 "Epic") (collectively, the "Parties") submit this joint status report and discovery plan detailing  
4 the Parties' views of their outstanding discovery obligations and a plan to work cooperatively to  
5 resolve any disputes prior to the close of discovery on June 9, 2023.

6 **I. WRITTEN DISCOVERY**

7 The Parties have served and responded to written discovery. The deadline to serve  
8 additional written discovery prior to the close of discovery is May 10, 2023.

9 The Parties have worked cooperatively to resolve issues related to written discovery. For  
10 example, the parties have met and conferred concerning Defendant's interrogatories no. 5 and  
11 15, seeking, respectively, the factual bases for Plaintiff's damages contentions, and the bases for  
12 Plaintiff's disputes with Defendant's invalidity contentions. Plaintiff has committed to providing  
13 a further supplementation by March 31.

14 The parties identify potential disputes currently known to them as follows:

15 **A. Plaintiff's issues:**

16 The parties have met and conferred about the sufficiency of Plaintiff's infringement  
17 contentions and the timing of their supplementation. Plaintiffs contend that document  
18 productions by Defendant were deficient and that source code and various related files were  
19 unavailable, incomplete, or otherwise presented without the requisite development environment.  
20 These concerns have been the subject of numerous discovery conferences and status reports  
21 since June 2022.

22 Defendant remedied the bulk of those issues in February 2023. Plaintiff agreed with  
23 Defendant to provide a first supplemental set of infringement contentions in early March 2023  
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1 reflecting revised positions in view of the Court’s claim construction decision. Those revised  
2 positions included a reduction in asserted claims and further explanation of infringement  
3 positions given the claim construction order, including references to certain Epic produced  
4 documents. Plaintiff agreed to provide a further supplemental set of infringement contentions,  
5 inclusive of citations to source code and other files from the Epic-produced IDE and  
6 corresponding documentation in late March 2023.

7  
8 Plaintiff provided its first supplemental infringement contentions on March 3, 2023. On  
9 March 7, 2023, Defendant sent correspondence outlining alleged deficiencies with the  
10 supplemental infringement contentions. Plaintiff is assessing Defendant’s position, which on  
11 initial review appears to be more accurately characterized as a dispute about the merits of the  
12 parties’ respective positions. Plaintiff will continue to meet and confer with Defendant as  
13 appropriate ahead the further requested supplementation, which the parties agree will be by  
14 March 24, 2023.

15 **B. Defendant’s issue:**

16 On March 3, 2023, Plaintiff provided supplemental infringement contentions, purportedly  
17 to address the claim construction order that the Court issued on October 20, 2022. The  
18 supplementation comes more than a year after Defendant first pointed out substantial  
19 deficiencies in Plaintiff’s contentions on January 26, 2022. Even now, nearly two years into this  
20 litigation and following extensive document discovery and source code review, Plaintiff has not  
21 provided contentions that map all of the limitations of the asserted claims, as construed by the  
22 Court, onto the accused virtual events in the *Fortnite* game world. On March 7, Defendant  
23 identified to Plaintiff several examples of limitations that their latest contentions leave  
24 unmapped. To pick just one example to illustrate, all asserted claims of the asserted ’605 patent  
25 require “instantiating . . . a new instance of a scene,” and then “automatically transporting”  
26

1 certain player avatars to “a *different* new instance of the scene” when a maximum capacity of  
2 avatars in the new instance of the scene has been reached. Plaintiff’s contentions simply ignore  
3 the “different new instance of the scene” limitation, saying nothing at all about how avatars are  
4 supposedly transported from one new instance of the scene to a different new instance of the  
5 scene. Notably, Defendant raised this deficiency in its earliest correspondence on the subject in  
6 January 2022.

7 Plaintiff had previously committed to a further supplementation of its infringement  
8 contentions to provide source code citations before the end of this month. Because the purpose  
9 of infringement contentions is to “allow the defendant to pin down the plaintiff’s theories of  
10 liability ... thus confining discovery and trial preparation to information that is pertinent to the  
11 theories of the case,” Defendant is asking Plaintiff to commit to mapping each limitation of each  
12 asserted claim onto the accused *Fortnite* events in that contemplated further supplementation.  
13 *Corus Realty Holdings, Inc. v. Zillow Grp., Inc.*, No. C18-0847JLR, 2020 WL 488545, at \*5  
14 (W.D. Wash. Jan. 30, 2020). The parties are continuing to confer on this issue.  
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## 17 **II. PRODUCTION OF DOCUMENTS AND THINGS**

18 Both parties have substantially completed their document productions, and Defendant has  
19 produced source code and related asset files for *Fortnite* and the accused events. Additionally,  
20 certain third parties, including the inventors of the asserted patents and their operating company,  
21 Utherverse Digital, Inc. (“Utherverse Digital”), have produced documents pursuant to subpoenas  
22 from Defendant. The parties have raised perceived deficiencies in each other’s productions—  
23 and are working cooperatively to resolve them.

24 The parties identify potential disputes currently known to them as follows.  
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1           **A.     Plaintiff’s issues:**

2           1.     Plaintiff identified missing data from the sets of financial data provided by  
3 Defendant. Defendant stated it is investigating the issue and will produce any missing data  
4 reasonably ahead of related fact depositions and the deadline for opening expert reports.

5           2.     Plaintiff identified missing technical documents that were “linked” within  
6 already-produced technical documents. Defendant stated it is investigating these documents and  
7 will provide Plaintiff with a written response by March 10, 2023, regarding what documents will  
8 be produced and what, if any, documents Defendant is refusing to produce.

9           3.     Plaintiff requested supplemental production of log files related to AWS EC2  
10 Services. Defendant requested further clarification as to what files are being requested. Plaintiff  
11 provided further detail on March 8, 2023. The parties will continue to meet and confer as  
12 necessary.

13           **B.     Defendant’s issues:**

14           1.     Third-party inventor Aaron Burch, who is represented by Plaintiff’s counsel in  
15 this matter, has produced very few documents responsive to Defendant’s subpoena, and counsel  
16 for Mr. Burch has indicated that his custodial files may have been deleted after he left Utherverse  
17 Digital in 2019. Because other documents produced in this case show that Utherverse Digital  
18 was anticipating litigation on Mr. Burch’s patents in 2019, Defendant is concerned that this may  
19 reflect spoliation of evidence. Defendant is conferring with Plaintiff’s counsel about whether  
20 Mr. Burch’s files were deleted and, if so, when. Counsel has committed to provide a response on  
21 these issues. Defendant may bring this issue to the Court’s attention after having a further  
22 opportunity to confer with Plaintiff’s counsel.

23           2.     Defendant is continuing to confer with Plaintiff’s counsel about production by  
24 Utherverse Digital of technical documents or source code sufficient to show the functionality of  
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1 products that may have embodied the patents-in-suit. To date, Uthervse Digital has produced  
2 no source code; however, Counsel will be making source code available for inspection, and the  
3 parties are conferring concerning the logistics of the review of that code. Further, the amount of  
4 technical documentation their production contains is inconsistent with testimony indicating that a  
5 substantial portion of the development of the relevant software was done by outside contractors,  
6 who would at a minimum need statement of work-type documents outlining what they were to  
7 code on behalf of Uthervse Digital. Counsel has committed to confirm whether there are  
8 additional technical documents yet to be produced. Defendant will continue to confer with  
9 Plaintiff's counsel on this issue.

10  
11 3. Plaintiff, the inventors, and Uthervse Digital appear to have asserted privilege  
12 over across-the-table communications leading to the sale agreement through which Plaintiff  
13 acquired the asserted patents. Defendant disagrees with the privilege claim, as the common  
14 interest exception does not apply to across-the-table communications in advance of any  
15 agreement between the parties. *Rembrandt Pat. Innovations, LLC v. Apple Inc.*, No. C 14-  
16 05093WHA, 2016 WL 427363, at \*7 (N.D. Cal. Feb. 4, 2016). As of Plaintiff's latest response  
17 on this issue on March 7, 2023, it appears that the parties are at an impasse, and Defendant is  
18 evaluating whether to bring a motion to compel.

### 19 20 **III. DEPOSITIONS**

21 The Parties have noticed and have begun taking depositions; they have also agreed to  
22 exchange Rule 30(b)(6) notices by the close of business on Friday, March 10, 2023; they do not  
23 anticipate difficulty completing the necessary depositions before the close of discovery. The  
24 Parties identify potential disputes currently known to them as follows.

**A. Plaintiff's issues**

1. Plaintiff has thus far noticed the depositions of three employees identified by Defendant as custodians of records:

Name	Title	Types of information under custodian's control
Matt Weissinger	VP Marketing	Documents relating to the marketing of the accused virtual concert events
Brian Boyle	Controller	Documents related to the financial statements and other financial information related to the accused virtual concert events
Darren Clary	Director, Player Insights	Documents relating to user metrics in connection with accused products

Defendant provided an agreed date for the deposition of Mr. Weissinger. Defendant has not yet confirmed Mr. Boyle's date, and in view of Defendant's anticipated supplementation of financial data, Plaintiff has requested Mr. Boyle's availability later in March 2023.

As to Mr. Clary, Defendant has taken the position that he is a senior employee that was not a custodian of Defendant's financial and analytic data, and that in view of his alleged seniority and lack of connection to the case, he is not an appropriate deponent. Defendant has proposed to identify an alternate witness to testify as to user metric information, and to further provide another alternate witness that would testify as to large volumes of financial data that had been produced. Plaintiff will consider those proposals and the parties will meet and confer as necessary.

2. Defendant's issues 2 through 4 below related to dispute with third-parties Uthervers Digital, Inc., Brian Shuster, and Gary Shuster. Although those third-parties are represented by the same counsel as Plaintiff, they are different and distinct parties. Plaintiff does not have the authority to speak for those parties in this report, and any disputes Defendant has

1 with those parties should be raised directly with each of them in whichever jurisdiction may be  
2 appropriate in each case.

3 **B. Defendant's issues**

4 1. Plaintiff has noticed the deposition of a high-level employee, Darren Clary, not  
5 identified on Defendant's initial disclosures. Mr. Clary is Defendant's Director of Insights and  
6 Analytics. Defendant has indicated that Mr. Clary is likely not the right witness to testify  
7 concerning the metrics and transactional data produced in this case. Defendant has indicated that  
8 it will propose an alternative deponent who is best-positioned to testify on these issues once  
9 Plaintiff provides its Rule 30(b)(6) notice, so that Defendant has a clearer sense of what  
10 testimony Plaintiff is seeking. The parties are continuing to confer on this issue.

11 2. On September 28, 2022, Defendant obtained an order from the Superior Court of  
12 British Columbia ordering that the inventors' operating company, Uthervse Digital, produce a  
13 corporate representative to provide testimony on certain topics. Uthervse Digital had notice  
14 and an opportunity to appear in the Canadian proceedings and declined to do so, thereby  
15 waiving, at a minimum, any objections to producing a witness prepared to testify on the full  
16 scope of the requested topics. Uthervse Digital, through Plaintiff's counsel, has indicated that  
17 it will not meet that obligation, and Defendant may seek further relief through the Canadian  
18 courts or this Court as appropriate.

19 3. During the deposition of one of the inventors,<sup>1</sup> Brian Shuster, Plaintiff's counsel  
20 asserted privilege and instructed the witness not to answer concerning basic facts and  
21 circumstances surrounding a crucial agreement between Uthervse Digital and third parties that  
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23

24 \_\_\_\_\_  
25 <sup>1</sup> Both Brian and Gary Shuster are represented by Plaintiff's counsel and, through Plaintiff's  
26 counsel, stipulated to this Court's jurisdiction over the subpoenas served on them in this action  
and their obligations thereunder. ECF No. 125.



1 led to those third parties disclaiming inventorship in at least one of the asserted patents. The  
2 basis for the objection was that the information being sought was conveyed to the deponent by  
3 his counsel. Because the attorney-client privilege protects communications and not facts,  
4 *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981), Defendant intends to seek a further  
5 deposition of Mr. Shuster to question him concerning the full non-privileged facts and  
6 circumstances pertaining to the agreement in question. As of the latest response on this issue  
7 from Plaintiff's counsel on March 7, 2023, it appears that the parties are at an impasse, and  
8 Defendant is evaluating whether to bring a motion to compel.

9  
10 4. During the deposition of another of the inventors, Gary Shuster, Plaintiff's  
11 counsel asserted privilege and instructed the witness not to answer concerning across-the-table  
12 negotiation communications of the sort addressed above in Defendant's item 3 under  
13 "Documents." Defendant intends to seek a further deposition of Mr. Shuster to elicit information  
14 about those non-privileged discussions. As of the latest response on this issue from Plaintiff's  
15 counsel on March 7, 2023, it appears that the parties are at an impasse, and Defendant is  
16 evaluating whether to bring a motion to compel.

#### 17 **IV. MEDIATION**

##### 18 **A. Plaintiff's Position**

19 Plaintiff's position is that mediation will be most productive following the close of  
20 discovery but prior to summary judgment briefing.

##### 21 **B. Defendant's Position**

22 Defendant's position is that in view of the parties' respective views about the strength of  
23 this case, a mediation will be most productive following summary judgment briefing.  
24 Accordingly, Defendant proposes a mediation deadline be set for 21 days after the filing of  
25 summary judgment reply briefs in this matter.  
26

**V. CONCLUSION**

The Parties agree that they will conclude the meet and confer process as to any issues currently pending and will note any motions to compel on the motion calendar no later than June 2, 2023, as provided by the Local Rules and the scheduling order (Dkt. No. 131).

DATED this 8th day of March, 2023

Respectfully submitted,

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